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Intellectual Property Aspects of Entrepreneurship: Protection in Patent and Trademark Areas, as well as Copyright and Know-How Areas (Local and Foreign); Penetration of Overseas Markets (Directly or through Licensing); Possible Industrial Espionage concer

Diane H. Dobrea

James Longwell

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UNITED STATES SPEAKER

*Diane H. Dobrea**

&

CANADIAN SPEAKER

*James Longwell**

MS. DOBREA: Okay. Well, I will pop in first and say thank you, thank you, Professor King, for inviting me here. I am actually a three-time alumnus of this university: undergrad, grad in biochemistry, and law.

DR. KING: Can you all hear Diane?

* Diane Dobrea is a partner in the Columbus office of the law firm Calfee, Halter & Griswold LLP. She practices in the area of intellectual property law, with a combined focus on intellectual property transactions, and preparation, prosecution and maintenance of patent and trademark cases. Though her technical background is in biotechnology, Ms. Dobrea's patent practice also includes nanotechnology, chemical, medical device, and consumer product portfolios. Ms. Dobrea oversees several large patent and trademark portfolios, working extensively with associates at law firms around the world on all aspects of intellectual property management. Serving both for-profit and not-for-profit entities, Ms. Dobrea provides due diligence and freedom to operate analyses, counsels clients on a wide range of research and intellectual property related transactions, and assists in litigation and dispute resolution concerning intellectual property. Along with her law degree, Ms. Dobrea also received her undergraduate and masters degree in Biochemistry from Case. She is a member of numerous Bar and Intellectual Property Law Associations and the Association of University Technology Managers, and has been an adjunct professor in Biotechnology Law and Policy at Case's Law School. Prior to joining Calfee, Ms. Dobrea served in the offices of the general counsel and technology transfer at the Cleveland Clinic and in the technology management office of Case's medical school.

* Mr. Longwell practices in all areas of intellectual property law, particularly as it applies to computer and information technologies. He advises start-up companies, small businesses, universities and large corporations on intellectual property strategy, including acquisition, protection, exploitation and enforcement issues. Mr. Longwell is also involved in Canadian and foreign patent and trade mark agency, primarily preparing and prosecuting patent applications relating to computer software, hardware, enterprise computing, web development, telecommunications, medical devices, housewares and business methods. Mr. Longwell also provides strategic analysis and advice to business owners and investors for financing, joint ventures, technology procurements, development and commercialization transactions.

MS. DOBREA: It is just always a pleasure to come back to the University. Although I relocated a year ago down to Columbus with our law firm, I find my way up here a lot, so I am used to seeing the faces around here on the campus.

We are trying to be responsive to the sentiments and questions that have been raised over the last couple of days in terms of how IP factors into the entrepreneurial context. And I say entrepreneurial context because there have been a lot of conversations about entrepreneurs and individuals or a small team starting up and taking an innovation out into the marketplace. But from the standpoint of an IP attorney, we deal with entrepreneurs whether they are a business unit within an existing company that is trying to go after a new opportunity or an individual who has a concept and wants to figure out how the solution that he or she has found can also make it out in the marketplace to help other people be successful and maybe make some money, too.

That is the backdrop of how we deal with intellectual property. What we want to talk about today is the role of intellectual property in the entrepreneurial context in terms of making decisions about when to spend the money, when to spend the time to figure out what kind of real estate you have got to protect, and whether or not you are stepping on someone else's real estate – which is an important consideration that can't be overlooked. Also, what is your competitive strategy and how, if at all, does IP fit into that competitive strategy?

There certainly have been a number of people who have recognized that you can have an innovation that isn't capable of being protected by IP, at least in terms of patent and trade secrets. So what other IP vehicles are available, and how can they best be exploited, and what are the risks associated with going forward with those things or protection?

Just quickly, when we do our due diligence we are really looking at two components: What does the entrepreneur have that can be protected and how do you figure out how to capture that.¹

But equally important, when that entrepreneur goes out into the marketplace with their innovation, what do they have to deal with in terms of somebody else who is already there? What ability do those other entities have to stop them from being productive? The bottom line is education is expensive and ignorance can cost more.

And I think that's definitely true. We, as IP attorneys, like to have all of the information at the earliest point in time so that we can pick it all apart and

¹ See generally William J. Murphy, *Proposal for a Centralized and Integrated Registry for Security Interests in Intellectual Property*, Appendix 6: *Due Diligence*, 41 IDEA 445, 446 (2002) ("Due diligence involves the investigation to verify and establish the existence of the intellectual property asset and liability and to determine the extent of encumbrances or restrictions on the rights to use the property.").

give you your best strategy. The reality is that the costs of us doing that are often so prohibitive that the best that an entrepreneur can do is understand enough about the context of the market they are going into to be able to weigh spending the money up front versus waiting and seeing what happens down the road.

We will then transition into covering how you protect your IP and talking a little bit about the differences on a global basis and certainly the differences in our IP schemes in the U.S. versus Canada.

MR. LONGWELL: I have been asked to focus more on the role and relevance of IP in the entrepreneurial context, and I think there are a lot of different facets to it that people tend to concentrate on, but there are many things they don't examine.

As Raymond mentioned at the beginning, I look at IP as both a friend and a foe. It is a friend, certainly, insofar as it attracts capital, which is really what every entrepreneur is chasing. IP doesn't follow money; money follows IP. It really brings in the money if it is there.

Why? Well, it is a vehicle that you can use to crystallize the knowledge that the inventor has, into a property right, which then can be held by a specific entity. Then those property rights endure for a certain life, usually 20 years for patents, longer for trademarks and so forth, but they are going to outlive that entrepreneur. So when the entrepreneur becomes disgruntled and wants to leave, the IP stays behind and continues to grow within another entity.

Most people see the acquisition of exclusive rights as the ultimate goal of IP. That's what the IP is supposed to be bringing to them. That's certainly one of the aspects. Sometimes they lose sight of what that really means.

An exclusive right might be great for trademark. I can use my trademark and I have a right to do so. But for patents, it is not always that way. It is a patent right and that gives you a right to stop others from making or using the invention that is claimed there.² But this is not a right that you can use.³ It does not give you that opportunity.

It is subject to the third-party right of others that we talked about. You know what else you can do with the exclusive rights? Well, you can copy them yourself or enforce them, but obviously, there is a vehicle you can use to license to others. You can get other people involved. So we excite people

² See 35 U.S.C.A. § 154(a)(1) (West 2002).

³ See *id.*; See also *Little Mule Corp. v. Lug All Co.*, 254 F.2d 268, 273 (5th Cir. 1958) (“[A] patent is not the granting of a right to make, use or sell.”); see also *Crown Die & Tool Co. v. Nye Tool & Machine Works*, 261 U.S. 24, 36 (1923) (“The government is not granting the common-law right to make, use and vend, but it is granting the incident of exclusive ownership of that common-law right.”).

and are able to offer things within intellectual property, and you can work within your own market.

But look forward, where might you be ten years from now and who might be there to help you? Go to Europe. File a patent application. Secure rights in China. Maybe you will be licensing other partners to get you into that market sooner.

Then, of course, in the last few years of development, that intellectual property itself can be relegated to someone else. People don't want to practice. They don't want to go into the marketplace. Many are happy to own IT and sit back and wait for someone else to stumble upon it so that they can be that troll who jumps out from under the bridge and says, "Ha, ha, I need a toll for you to pass over." It is going to cost you a lot of money. Our experience with our neighbors in Waterloo for Research In Motion – it cost them a lot of money to pass over that bridge.

So, that's one of the attractive aspects if you are one of these people, but it is one of the foe aspects for new entrepreneurs coming into a new space. They have to be worried about the third-party IP that can be shaping the scope of the protection for whatever they wish to obtain as well as just being a barrier to entry into a particular market.

So that, of course, involves a due diligence exercise. We are going to talk a little bit about that in a few moments. How do you evaluate the rights of others when you want to take the IP? When do you want to take the opportunity to do that? Is that something you do earlier? Do you postpone that if you can? How much money are you going to spend, and in what markets are you going to do that because it can be a very costly exercise? And why is it costly?

Well, IP is complicated. I mean, it is science law, and the law puts you in institutions, and as much as we heard the money doesn't like to see borders. IP lives and dies, in a way, on borders and the nuances and the various laws. It is really important that when we see new entrepreneurs coming in, maybe the institutional context like universities where they had this great idea, they did their thesis, they had it published, everything looked great, and somebody told them that they should commercialize. They got some interest, and then they realize their entitlement has been lost in jurisdictions because they published first. They are no longer able to secure the adequate protection they thought they could get there. So borders exist.

The differences in law are very much apparent in intellectual property. It is costly because, well, we charge more for professional services. There are fees involved. You are moving into foreign markets whose translation costs are involved, and that's up, but also, we deal with hard data.

There are lots of opportunities where there is nothing you can do to extend it, and that's time and effort for entrepreneurs and innovators to take

out of what would otherwise be conducting their business to handle these issues and that can be costly.

The next thing, before we go on, I want to address the educational deficit that entrepreneurs often have in regards to their role in the IP and how IP is used. They are not really sure of the different types of rights available to them, the confusing copyright, for example, and patent rights, copyright and trademarks, for example.

So when they are engaging with others to do the types of work that they would normally do on their own, they are not setting themselves up to best protect their own innovation. So we have to spend a lot of time with them putting into place these proper procedures – the employment contracts, the ways that they can capture their innovation so they are protected going forward, to prove ventureship and other ownership issues. Those are big aspects to entrepreneurs looking for a gain with the lowest cost.

That has lasted awhile, and our institutional innovators, in particular, are facing increasing pressures to both innovate as well as to attempt to protect. And costs on the outside are very hard, tough to absorb, and we need, as professionals, to find ways that we can assist these institutional innovators to bring our costs into their budgets, educate them as to why we can't always do that. So we have to be careful to navigate IP policy issues with inventors and add a level of complexity that is costly.

MS. DOBREA: By the way, we are welcoming any kinds of questions so don't hesitate to interrupt.

But going off those comments, patent law is clearly very complex. It can be complex based on the kind of IP that you seek to protect, and the extent and quality, completeness of the disclosure especially in the research context. Those of us who work with university inventors know that they have great ideas that are developing, and they are going to be out there publishing. There is a big push in those institutions to protect transfer functions and take those ideas and get them to market.

What they lack in those organizations is the sophistication in a particular business area. So, you have got tech-transfer people handling technologies that span these very broad ranges.⁴ And that's not even to mention the political dimension within an organization and who really calls the shots in terms of how technology is taken out to the marketplace.⁵

⁴ See generally University Technology Transfer: Questions and Answers – The Council on Governmental Relations, <http://www.cogr.edu/docs/BayhDoleQA.htm> (last visited, Nov. 13, 2007) (noting the “broad spectrum of organizations and individuals” to which universities license technology); see generally Jeff Karoub, *Industry experts shed light on technology transfer*, SMALL TIMES, Nov. 29, 2004, available at http://www.smalltimes.com/Articles/Article_Display.cfm?ARTICLE_ID=269746&p=109 (discussing the use of industry consultants during technology transfers).

⁵ See generally Karoub, *supra* note 4 (discussing the internal conflicts universities face

DR. KING: Are you going to cover the competitive law aspects?

MS. DOBREA: Yes.

DR. KING: I was thinking about that troll under the bridge. I think it is a major concern in some cases, in both the United States and Canada. You could do it now or whenever you want to do it.

MS. DOBREA: Okay.

MR. ROBINSON: Following up on the comment about the university inventors, in my experience, it has been troublesome to do high-tech joint ventures with university people who were also affiliated with a private research institute. There was one connected with a hospital, and I understand that is very common, certainly here at the Cleveland Clinic.

The big problem was to figure out when the guy had his great insight. Was it while shaving in the morning? If so, was he was doing that for the university or the hospital? And, of course, my client was a bloody-minded commercial corporation who was going to grab this technology and do huge IPOs and make jillions of dollars. It was just a disaster.

We couldn't sort the thing out properly. I understand that in the U.S. there is a law or protocol that makes it clear how much of an ownership stake the university has in the innovations of its professors, and how much stake a professor has in the same.⁶ Alternatively, I suppose a professor may be able to avoid this issue altogether by saying, "I did that for the private research institute." This is what the commercialization person wants to deal with.

So I guess the question is: is there such a law, and is there any way to deal with this in Canada, where there doesn't appear to be one?

MS. DOBREA: No such law exists. Maybe what you are thinking about is the Bayh-Dole Act. The Act can apply if there is federal funding in an institution. It can also apply in the context of a company that works under an SBPR grant, a small business type grant that focuses on driving innovation and has basically a feed into provisions that are equivalent to Bayh-Dole.⁷

Bayh-Dole doesn't prescribe the numbers for sharing. But Bayh-Dole does prescribe some fundamental concepts that the Government, by funding all or a portion of whatever work is done like innovation, has the right to have a disclosure of innovation. It also has some expectations of the university that wishes to elect title because the Government owns it in the first instance, so the institution has to elect title.⁸ I mean there is a straightforward procedure and there is the underlying power of issues.

when dealing with technology transfers).

⁶ See generally 35 U.S.C.A. § 202 (West 2002) (noting the disposition of rights of each party to a funding agreement).

⁷ See 35 U.S.C.A. ch. 18 (West 2002).

⁸ *Id.*; see also Council on Governmental Relations, Intellectual Property and Technology Transfer: the Bayh-Dole Act: A Guide to the Law and Implementing Regulations,

The procedures are relatively simple to execute. Compliance is spotty.⁹ You know, it just depends on how well situated an institution is to really capture and administer those steps. But at the end of the day, you know, they have identified the IP. They have notified the Government. They have elected title. They have granted back the confirmatory license to the Government so the Government can itself, on its behalf, have that technology factor.

The institution is expected to favor small businesses over larger ones. That's not an absolute. Favoring U.S. businesses over foreign ones is also not an absolute. Still, for a substantial manufacturer in the United States that is pretty big, getting over that hurdle is not the easiest. The Government reserves march-in rights.¹⁰ So if compliance is not good with respect to making the best effort to get the technology, that taxpayers paid for, into the marketplace then the Government could conceivably march in, take those rights over, and hand them over to someone else.¹¹

There have been a few forays into trying to get a federal agency to exercise march-in rights, but that hasn't really happened. So it looks onerous, but it really hasn't operated as such. One component of that is that a share of the revenue that comes back to the institution goes to the inventors. But what percentage is ultimately prescribed by that institution's policies? There are no guidelines, but pretty much across the board, it is a decent share at most of the institutions that I am familiar with.¹² There have been surveys done by the Association of University Technology Managers and Licensing Executives to support that.¹³ They are two organizations that track innovation particularly out of funding institutions.¹⁴ But if you are outside of the federal funding context, then it is sort of a free for all.

At most, it is up to the policies of that institution, and you have by then identified one of the important issues that can be a problem down the road.

<http://www.mtsu.edu/~research/docs/TheBayh-DoleAct.pdf> (last visited Oct 21, 2007).

⁹ See U.S. General Accounting Office, *Technology Transfer Reporting Requirements for Federally Sponsored Inventions Need Revision*, GAO/RCED-99-242 (Aug. 1999), at 2, available at <http://www.gao.gov/archive/1999/rc99242.pdf>.

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² See generally The Association of University Technology Managers: Frequently Asked Questions, http://www.autm.net/aboutTT/aboutTT_faqs.cfm#7 (last visited Oct. 22, 2007) (discussing how universities use the revenues realized from licensing).

¹³ See The Association of University Technology Managers: Licensing Surveys, http://www.autm.net/about/dsp.licensing_surveys.cfm (last visited Oct. 22, 2007) (full surveys available for purchase).

¹⁴ See The Association of University Technology Managers: About AUTM, <http://www.autm.net/about/> (last visited Oct. 22, 2007); see also Licensing Executives Society International: About LESI, <http://www.lesi.org/content/presidentsmessage.aspx#what> (last visited Oct. 22, 2007).

Do the due diligence at some early point to determine under what context an invention arose. Even if we are talking about an entrepreneur not associated with the university, you would be surprised to find out what their friends are working on. "Oh, yeah, this guy was a consultant, but he was actually a doctor of this hospital. And his contract stated that anything that he invents has to be assigned to the institution, even if he signed an agreement to the contrary."

So sometimes you have to dig far enough to understand all the connections in order to identify what could be a problem. And it is a matter of when do you do that digging, because at some point you might be down the road trying to unload that technology per your exit strategy, and you don't want to find out then, when they do their due diligence, that you don't have claim to title.

Then you have somebody that says, "Sure, I would be happy to assign it for whatever." But that's only one piece of it; identifying who are the rightful contributors, if there is an inventor, if there is a problem with somebody who claims to be an inventor, which would upset the validity of a patent down the road.

So it might not be something that is going to rear its ugly head for ten years after the entrepreneur started the company and got it going. When do you look at those issues, and how do you deal with them is a difficult question. Generally, it can certainly vary between the United States and Canada. I am absolutely certain in the United States that, except for an employment contract that someone may have or the Bayh-Dole Act that may impose certain obligations on a funded investigator, if somebody works for a company and comes up with an investigation there is no agreement that says they are obliged to assign that to the company, that they own it as an inventor.¹⁵

And there are plenty of relatively sophisticated, and in some instances large, clients that I dealt with who maybe know that and talked to some of the organizations. But they will do anything to implement it. They are really surprised, sometimes, when that really nice engineer says, "Yeah, I would be happy to assign it to you. I want my X amount of dollars or a percentage."

Then the client calls up and says, "They can't do that. It is work for hire." "No, that doesn't apply in the context of an invention whereas..."

MR. LONGWELL: Whereas in Canada, we generally have the rule that, if it is not in the employment contract, if you were hired to invent, it will be

¹⁵ See *National Development Co. v. Gray*, 316 Mass. 240, 246, 55 N.E.2d 783, 786-787 (1944) ("[The Court] looks upon an invention as the property of the one who conceived, developed and perfected it, and establishes, protects and enforces the inventor's rights in his invention unless he has contracted away those rights.").

implied that your invention is owned by your employer.¹⁶ So that is a remarkable difference between our two countries.

MS. DOBREA: So then it doesn't matter whether they say I am or am not an inventor if somebody asserts *inventorship* later and tries to upset the apple cart later.

MR. LONGWELL: Absolutely, as well as the misnaming in the patent, minimizes so the courts aren't quite so concerned. As long as they were up in the listing, the applicant was the one who was really entitled, whether they got the inventor's name correct or not is not a major concern. It can be costly to throw out the issues and get a ruling that, in fact, the invention claimed by the inventor, it doesn't really upset the apple cart, then so be it.

But to go back to Dr. King's question, we will talk a little bit more about IP strategy later, but there is a real difference I think in the culture in Canada and the litigation area and our laws in that area that have made trolls far more attractive in the U.S. context than they are in Canada. There are a number of reasons for that. One of them is the cost of litigation in Canada.

Successful parties are entitled to costs, and you can lose and still be entitled to costs by making proper settlement offers. We don't have jury trials in Canada in patent matters. They are almost exclusively really big trials and are all settled by federal court judges who have some expertise in this area.¹⁷

So again, there is no big award at the end of the day. We talked a little bit, Diane and I, about the differences of triple damage awards that are available here for people who acted out of willfulness when infringing. You don't have any of that opportunity.

So with a smaller market, with those big litigation differences, we don't have a troll issue, per se, in Canada. We have IP rights holders. We have universities, institutions that hold IP and don't exploit them, and they are troll-like in a way. They are ready to license, but they are not viewed with the same disrespect that private individuals or corporations, limited liabilities are when holding on to these IP rights and exploiting them. At the last moment. And, really, is that a problem with patents, or is it more a question of litigation culture? Maybe there is an inability there.

MR. McINTOSH: Just following up on Michael Robinson's question, I was interested in knowing if in Canada, if a business decides to work along with the university and enters into an arrangement with the university in essentially a work-for-hire type of contract, where the business has an idea, then goes to the university to make arrangements for that idea to be developed into a prototype – are there special concerns that need to be

¹⁶ Colleen Spring Zimmerman & Ziad J. Katul, *Patent Ownership in Canada*, THE LAW. WKLY., Apr. 21, 2006.

¹⁷ Rudolf E. Hutz, *Where To Litigate Patent Infringement Cases*, 1 DEL. L. WKLY. n.4 (Dec. 1, 1998).

addressed in terms of making sure that the intellectual property is conveyed to a business that would be outside the normal course of a contract, saying this is work-for-hire, or is the university free to enter into those kinds of relationships in order to basically provide opportunities for their students?

MR. LONGWELL: Well, that's a good question, and I think you get different answers from different universities. I can use McMaster University as an example. Their IP policy would dictate that the university is supposed to benefit in these situations. They would allow professors to have ownership rights, but this doesn't mean they won't be able to come to an arrangement with the person in part of the trade or even other parties who might be paying a portion of that.

So that at the end of the day, the business owns what it needs to own to make sure it is exploited in a commercial manner. Universities are getting some credit getting their license back, and this is useful. Then you have another institution down the road where RIM is in Waterloo. The University of Waterloo's IP policy states that, as inventors, you own 100 percent, and we would love it if you would think of us when you are successful, to give us something in return. This is a very pro-inventor and pro-entrepreneur culture.

It depends who you are. Some institutions are a little more inflexible, and they retain ownership. They want their name on the IP. They think it is a barn and that can be difficult because of Canada's co-ownership law on patents.¹⁸ It is very much more complicated than the United States.

MR. COHEN: This is off the topic but in line with the world of globalization, at what point do I file all of these foreign patents? Do you have a timeline chart covering this?

MS. DOBREA: Well, much of it is hardwired into the way the whole system works, except if you are outside of the treaty countries, which, you know, carry the wisdom of filing in a lot of those countries because of the market size and the great unpredictability of what you are going to encounter in their patent offices.

There are a couple of different levels on which to answer that question, but if the simple question is: what do I predict as my timeline once I file an application? It is pretty much etched in stone. With respect to what's within the four corners of a patent application, it is filed as your priority application.

Whether you file a U.S. provision or U.S. utility or file first in the Patent Cooperation Treaty (PCT), which is sort of a central place where you can file and get into all the treaty countries or file first in Canada, one way or the other, you have gotten yourself into the patent system.¹⁹

¹⁸ Francois Painchaud et al., *International Mergers & Acquisitions: The Canadian Perspective*, <http://robic.ca/publications/Pdf/277-FP.pdf> (last visited, Oct. 22, 2007).

¹⁹ See generally Sheldon Mak Rose & Anderson, *First-to-File v. First-to-Invent: A Bone of Contention in the International Harmonization of U.S. Patent Law*,

And with respect to all the countries that are party to the Harris Convention and/or under the PCT, you are in the system. You can't change that application.²⁰ You can't add any new matter, which means you better hope you completed disclosure as you need, and that means to get the kind of claims you would like to get.

Twelve months out is usually the time frame where you have to jump off and get into the national, the PCT filing, the international filing and then depending on the jurisdiction, 30 months from the priority filing date, so that's the priority filing date. That's the provisional date.

That was your first application, which is when you have to make the first decision about jumping off into the various national jurisdictions you want it filed in. So it is hardwired, and that can be good or bad. If you have got no prior disclosure of your invention, forget right now about freedom to operate, but you have your invention captured, completely enabled in your disclosure, and if you have the opportunity to have some substantive examination within that initial 18 to 30-month period, then you are in the best position to make decisions about the viability of the kind of claims you would want to get in the jurisdictions that from a business standpoint you want to get perfection in. I am not sure if that's responsive to you.

MR. COHEN: That's pretty responsive.

MS. DOBREA: From the nuts and bolts standpoint, that's the easy answer. The harder answer is when do you first file, and that brings us into, under due diligence, what we were first talking about, when do you even try to figure out if what you've got can be protected? From a patent attorney's standpoint, I am certainly surprised at the timing of when entrepreneurs try to actually answer that question.

I say I am surprised because they will, a fairly long distance out, get a lot of their own money committed, friends and families' money committed, perhaps angel money committed, writing business plans, getting toilet pipes made, getting engineers doing things for them, and then they say let's sit down and talk to patent counsel.

And I laughed at that because sometimes you give them answers that they don't want in view of how much resource they already put into it. But we heard a good example yesterday about flying completely blind. The inventor, though, wasn't going to tell what was inside the black box; didn't want anyone to look, and on faith, the investors went forward, and that hydrogen peroxide sterilization technology is going to be a reality in the marketplace.

So presumably at some point, they got their heads around what there was to protect, and they also figured out whether or not they are going to step on

<http://www.usip.com/articles/1st2fil.htm> (last visited, Oct. 22, 2007).

²⁰ See generally Garry E. Hunter, *Status of Intellectual Property Law in the Age of the Internet*, 38 L. TECH. 1, Jan. 1, 2005.

someone's toes and, at a minimum, have a lot of their money spent defending an infringement suit and potentially be knocked out of the market.

So that kind of timing, that's a little bit tougher to sort out, and from our standpoint, we can ultimately be the technical experts prosecuting patent applications. Both of us feel we do that pretty darn well. But the best thing we can do as patent counsel, and this is playing off some other comment that the venture capital people made, is finding a way to have a better, more informed strategic entrepreneur.

MR. LONGWELL: And there is the question: when are you legally ready, and when are you strategically ready? A lot of inventors are legally ready fairly quickly. They have enough knowledge of their invention. That's certainly my experience. You don't need a lot of data. You don't need a prototype. It is pretty easy to describe a lot of business methods and software communications inventions that I see.

So you can be legally ready to patent quite quickly. Because of that, there is a rush to patent, and in most of the world, we are still faced with first-to-file, where the first invention to file is entitled to the patent,²¹ Within the United States, which remains the last reasonable first-to-invent country,²² and then you are strategically ready. Sometimes they file their own provisional, or use other counsel before coming to us and looking for assistance.

Strategically, they weren't ready, but their deadlines are coming up. It is now the tenth month, and they have two more months to file a PCT, and they literally have no money left. The PCT application, it is on the order of \$6 to \$8,000, and they don't have that money and want to come to the bank of Jim.

Do I help you? Well, why? I don't know you from Adam. I can look at your technology, and I can try and get excited, but I have to sell this to my partners as well. I am not going to fund you until you find funding, and that's a tough, tough call. We are really not in the business of investing in our clients. It is not good from an ethical standpoint I don't think. We saw a lot of that in the 1999-2000 range, and law firms have been burned by that. And so it is a tough decision.

We have to be flexible and you have to come up with good payment plans to allow our clients to avail themselves of the IP provision, but we also have to be, sometimes, the gatekeeper and just say no.

MS. DOBREA: We don't want to forget, there are other forms of IP, right? To have an IP position, you have to have a trade secret, which may equate to know-how. You have to have something that can be patented or protected by its identification and goodwill, which would be trademark or trade dress or something that can be protected by copyright. Unless your

²¹ Rose & Anderson, *supra* note 19.

²² *Id.*

business model is just to aggregate intellectual property rights so you can enforce them against others when they stumble across your field, they are not an end unto themselves.

While I believe that's a well-understood notion by investors and entrepreneurs who are great, wonderful people, who come up with these wonderful ideas and push the envelope, they don't necessarily appreciate what a patent is and what it isn't. Mostly we are going to talk about patents in that context, and then – that it is not an end unto itself, and it doesn't solve our problems.

And how you go about trying to secure protection – it is a decision best made after you have understood what that opportunity is. So going back to the earlier discussions, starting with David Morgenthaler, there has to be a business opportunity that makes sense. There has to be an innovation that plugs into that opportunity, but there has to be an opportunity.

There has to be money. Someone has got to underwrite it. Maybe it is not a lot, and you need to have all the resources in structure to carry forward, whatever that may be in the industry. But the mere recognition that there is an innovation doesn't automatically necessitate that you go to the Patent Office and file an application because, depending upon your business model, maybe the ability to market a patent pending when you are showing it over in Hong Kong is all you really need to keep your competitors far enough at bay before you go into the marketplace. Since you have already a presence there and recognition, it is going to carry itself and may be weak from a patent perspective, too.

That doesn't necessarily make money VCs excited because they think the payoff at the end isn't necessarily there, but that is a relevant strategic thought process for some of the entrepreneurs who deal with it. Others have a very complicated, and perhaps very robust position, from an IP standpoint, and making a decision as to how to understand that, how to capture what they have got and also sort through what their risks are in terms of stepping on someone else's toes can become a much more complicated and expensive undertaking. It can only be done most effectively if they really understand the opportunity, know the market they are going into, who is the competition, and are they a little guy.

And there are a bunch of big guys out there who have a bunch of patents, and that's maybe death to the idea, but maybe that's an entrepreneur's way in, in and of itself. You found a way to do something that the market hasn't figured out yet. You are not going to go nose to nose with Johnson & Johnson, but you may have found something that tucks nicely into their portfolio and it makes sense for your business to develop that to a certain point and then transition it off to them.

When do you contact them? Do you try to get cross licensing? Do you try to do a deal of strategic partnership? Those are the kinds of questions that

come out of thinking in the first instance about what the opportunity is, what space am I going into, how long is it going to take for me to get to market, how much is it going to cost, and what are the risks if I fly blind and I have no idea whose toes I am stepping on. How much money did I spend, and do I stand to lose, if I have to stop in my tracks and pull my products out or try to defend an infringement action and pay damages?

And that's really all there is to it. Patent attorneys, again, we love that you come early, you have an idea. You know, we do all the thinking upfront, get your patent applications filed, and at least, when we are prosecuting your case, the world is as controlled and encapsulated as it can be. But that whole process in and of itself can cost so much money that it would be cost prohibitive to a small entrepreneur who has got \$200,000 in his or her pocket to try to get out there and make something happen.

And so really, again, you know, the more we can help them sort through those questions and maybe give part answers – understanding we won't have certainty on this. You can't afford to have an opinion written on this, but we can see what the environment is.

We can understand that there may be some patents that could potentially block you; they could be invalid. The scope of the claims might not be as broad as they appear to be. They might be held by big competitors in the marketplace who can block you. But knowing that those rights out there exist creates the opportunity to develop business solutions, business strategies.

So it doesn't necessarily blow you out of the water. Again, flying blind and not knowing what's out there isn't necessarily a terrible thing to do as long as you figure out that you can afford to pull your product back. Whatever you put into it, worst-case scenario, you get back a cease and desist letter, or they file a lawsuit, you can just close up shop and move on and life goes on. You are willing to take that measure of risk.

Once you get money people involved, they are going to dictate a little bit as to how far they will go before those questions need answering.

MR. LONGWELL: I wonder, throwing the question back out to the audience, particularly the VCs, is there a difference do you think? I think there is, between due diligence in Canada and due diligence in the United States when you are making an investment? The placements in Canada tend to be significantly smaller.²³

There is only so much in the VCs' hands to pay for transactional costs to make investments. They are going to try and shift the risk back to the people seeking the money to prove the respect of their IP. Most of the arrangements I see, due diligence is one of the areas, particularly in IP, that people talk

²³ See generally Hilary Davidson, *Goin Down the Road: Why are Canada's best Entrepreneurs Heading South? It's more than the Money*, PROFIT MAGAZINE, Oct. 1, 1999.

about, yet it is one of the first things that gets popped. And there is not a significant amount of freedom to operate type of analysis. It is not done in most places that I have worked in.

I don't know if that's the same for Diane or not.

MS. DOBREA: It varies, and it depends on the client. My university clients who have a license for technology, frankly, they don't care whether we do any searching or not. We will tend to do searching so we can write an application that best covers their invention and deals with the art that is out there.

Clients, existing firms, the firms are entrepreneurial by spirit but not entrepreneurial by some people's definition, and they want to know because they are planning to launch a product into the marketplace. They need to understand what their risks are. Frankly, some of them, and I, from a business standpoint, completely agree with the decision, will find a patent that looks like it falls exactly within the scope of its claims. It looks like there is a lot of good reason to think their patent would be invalid.

So you make a decision, take a risk, and there is a willfulness to it. So they want to look, and they are going to make a real business decision. There are also those who are not quite married to any particular concept. I am thinking about smaller companies in the marketplace who have got cash flow from existing products that have gotten things in their pipeline. They are trying to decide whether to spend the next \$50,000 on an FDA study on a lot of gut response. What do you think? And it is not a competent opinion. You can't be definitive until I do the complete analysis.

So the question is: can I find anything that is right in the middle of the road? And you make business decisions on where you are, and if it is not in the middle of the road, sometimes we identify points of novelty in the heart that people are inventing so we can focus and design around strategy if that is needed. So it varies.

In some of the transactions that I have dealt with, you know, we have done full-blown due diligence analysis and written full-blown opinions. But I would say as a general rule, irrespective of how small an entity is or how large and deep their pockets are, you just don't do it on most properties because it is, in and of itself, cost prohibitive no matter how wealthy the company is.

Their portfolio is that much bigger, which means they are going to be writing big checks for due diligence analysis. So at some point, it is just a gut decision, and if they are well established in the market and they know the marketplace well, what their own existing patent strategy is, and the knowledge of the players is probably going to help them a lot versus an entity that is going into a new area or a brand new startup that really is not familiar with going into it at all.

PROFESSOR KU: Since there are no other questions I wanted to ask one in particular, and that is, you have already pointed out some differences between U.S. and Canadian law and patents. Clearly, there are differences between the U.S.-Canada and internationally.

Are there any reasons from a patent law, or other intellectual property perspective, for an entrepreneur to consider forum shopping, for example, choose a regime that might be more favorable, or are they pretty much going to be stuck with, or governed by, the law and the nature of the jurisdiction in which they do business?

MR. LONGWELL: Yeah, I will chime in because that's something I do almost all the time – is forum shop. The Canadian Patent Office is not a major player in North America and, therefore, not in the world.²⁴ Most of our inventors look elsewhere to file their patent applications.

I worked for a company who filed their first application simultaneously in the United States and Europe, but they don't file in Canada until much later. So forum shopping is exactly what they do. Now, I think it is a little different in the United States because you have specific requirements to obtain a foreign filing license, primarily on security reasons, before you can file in another country.

We don't have that defined in Canada at all. You can file anywhere that you want.²⁵ Last year at this conference we heard about forum shopping on the litigation front and how prevalent that is and there are absolutely people doing it with regularity. They are sued in one country or didn't have a problem with a particular market, but their IP position there is not great. They are going to forum shop and possibly sue them in another jurisdiction where they can either impeach that patent – that might be in the United States and get the leg up on that litigation – or where they can use their own patents to their advantage in that other market and bring it to courts there.

And I think that was really interesting, the statistics that Mike Elmer had last year at this conference, and talking about forum shopping.

MS. DOBREA: The bottom line is, where you protect needs to be decided based on where you see your product going into the marketplace, where there is a market for it, so you are not going to protect everyone, and you are hardwired. Again, once you filed an application somewhere, you do it with a finite period of time, you have to make a decision as to whether or not you are going to avail yourself of the right in any other jurisdiction under their patent laws.

So forum shopping is certainly more relevant I think in the enforcement context or in order to use some leverage in one market to derive a result in

²⁴ Marcus Gallie, *Canadian Patent Prosecution*, <http://www.ridoutmaybee.com/Pageasp?PageID=122&ContentID=779> (last visited, Oct. 22, 2007).

²⁵ See generally Rose & Anderson, *supra* note 19.

another. But in terms of taking advantage of the patent system, it all ends up running together. Then, of course, you can get vastly different results in the prosecution in different jurisdictions just based upon how the rules work.

We talked a little bit about what the government is doing to help, and I will temper my comments about the U.S. Patent Office, but it is expensive.

MR. LONGWELL: Is there a stop on this recording?

MS. DOBREA: It is getting more expensive. I am not sure of the extent of the audience's familiarity with pending rule changes at the Patent Office that have most U.S. Patent attorneys shaking in their shoes. We are stressed because of the amount of time and effort that we will have to put in to carry applications, think strategically about claims, and how many claims we have searched and how much art we need to cite, especially in view of Federal Circuit Court decisions about inequitable conduct and duties of disclosure. We have a very challenging patent system already, and it looks like it can get much more challenging and much more expensive, and that's in sharp contrast to Canada's system.

MR. LONGWELL: Absolutely. We sort of have the kinder, gentler patent system in a way. I don't know if that reference is appropriate, but costs in Canada tend to be lower historically at the filing stage and at subsequent stages. We don't have the rule requirements you have inherent in Canada – good faith, and the obligation to disclose what you know that might materially affect patentability to the Patent Office.²⁶

We only have to tell what we know or are asked. That's one big difference, and it is a lot cheaper, obviously. We don't have the rule changes. We don't have fees for the different numbers or types of claims that you may have in a patent application. So it is a little easier. But the delays in our Patent Office even exceed the time in the United States Patent Office.

When you are looking at a software invention that might not issue for five plus years, or biotech, which can be six to seven plus years, this can dissuade people from even patenting in Canada because technology turns over so quickly. That's another reason.

But recent rule changes in Canada tend to go a little bit the other way. Proposed changes last January were arguing with the reduction and burden on applicants, and they are eliminating fees, or proposing to do so, and to make some difficult decisions. We presently have a reduced fee structure for small enterprises.

We are trying to enhance those and encourage more filings. We heard, earlier today, comments from Mr. Hisrich about the number of filings in the United States, and there was only one instance where the U.S. was outpaced by foreign filers. In Canada, it is, year in and year out, due to population, on

²⁶ See generally Charles Lipsey, *Canadian Court Decision Places Broad Class of Patents in Jeopardy*, MONDAQ, Aug. 17, 2007.

a scale of anywhere from 7 to 1 to 9 or 10 to 1. This means that a good portion of my business involves acting for foreign IP owners. But it also means that our Canadians are not filing at anywhere near the same pace that inventors are and entrepreneurs are in other jurisdictions. That's a gap that we have to close if we are going to remain competitive. We are going to have to have to encourage the further development of our knowledge-based economy.

MR. ABRAHAMS: This is a quick question for Diane: is it not possible that the cost for patent filings in the United States has been pushed because the USPTO has been privatized, and that's how they get their revenue? It seems like there is entrepreneurial cost recovery, and the government has been that way for a while.

MS. DOBREA: Yes. I think there are other at least equally significant factors, including the diversion of fees to other federal government activities, which may be what underlies the Patent Office's push to what will significantly drive up costs for applicants.

MR. ABRAHAMS: Americans are considered privatized.

MS. DOBREA: I don't really think that's it. And I say it only in the nicest of senses. I mean, it is already really expensive, and the fees that our clients pay to file an application, to take modest extensions of time are pretty significant already, and we cost a lot of money, too. So that adds to it.

We also have a very active Federal Circuit Court that looks at patent questions and tends to confound what we thought were relatively clear rules, necessitating us to do exactly the things the Patent Office doesn't want, which is to file more prior art references.

And I say prior art; I never admit anything is prior art. Let them say that, but art references and the changes of the rules are going to necessitate that we either limit our disclosure to prior art to 20 references or start describing why we are not materially impacted by that art.

And that creates a mess when it gets to litigation down the road because we have spun those references, and we have made representations, or we have made admissions. Gosh knows what we have done.

MR. LONGWELL: Right. In Canada, for example, the activity in the Patent Office, unless it is fraudulent, is not a consideration of litigation.²⁷ So you can almost effectively suck a blow at the same time. You can tell the Patent Office one thing and get to court, and if what you said was not to your advantage, you can tell the court.

MS. DOBREA: Yeah. Whereas filing wrapper estoppel in U.S. litigation is a huge component.

²⁷ See generally Damien McCotter, *Using Electronic Records in Patent Proceedings*, MONDAQ, June 6, 2007.

MR. LONGWELL: It complicates the process in the United States immensely where we don't have that in Canada or other parts of the world. It is a huge difference in cost. So cost per capita of obtaining IP in the United States is high and getting higher, whereas in Canada, it is relatively high, because we have a small population, but it is dirt cheap in China right now.

And you say, well, why would you file there? Well, China had no IP in 1980 and has an incredible amount of IP now.²⁸ Is it getting better? Yes. Where will they be in 20 years? Who knows, but it is likely only to get significantly better. The pace of their programs is astounding.

We can't get substantive rule changes through in Canada and are really needful in terms of changing IP law. We have a sit-on-your-hands kind of government approach to most of IP. Whereas in China, that's different.

MR. ROBINSON: Moving on to another kind of IP, I confess my own ignorance here, but I understood that Mexico has a trade secrets registration protection statutory regime in force, and we don't have that in Canada, and I don't think you have that in the U.S.

Has anybody had any interest in studying what the Mexicans have done? Under NAFTA, we were all supposed to provide a high level of protection for trade secrets, but it seems to me the only country that has done it is Mexico.

MR. LONGWELL: Well, I don't recall that the NAFTA treaty imperative – making us having equivalent treaties. We only had to provide comparables, and there was no obligation to add legislation. There were a lot of things grandfathered along the way in the way we were treating each other.

And I don't think I have heard of any study absent a registry for trade secrets. It is hard enough to get the trademark registry working properly, and that's something that is out in the open. So I would be very surprised to see a trade secret push.

PROFESSOR KU: In front.

MS. DOBREA: Douglas first and then –

DR. BARBER: I just want to ask a question about the defense of intellectual property claims, and I suppose it is a question probably principally about the trolls, and the trolls are probably not a big factor in entrepreneurial activity because they go for big fish, not minnows. Nevertheless, it ricochets into smaller companies, and I guess my question is: it seems as though, at least when you get into the courts with these trolls, which I have been involved in a number of times, that prior art doesn't seem to matter very much, and, in fact, they have settled out of court, recognizing that you may have a very low probability of making a case on prior art. And if you lose the case on prior art, your costs go way up because you can get

²⁸ See generally *Under the Dragon's Breath*, BUS. & FIN., Sept. 27, 2007.

into penalties and all sorts of things. So, in fact, the trolls thrive on settlements, out of court where actually the owners of the IP or the people that are debating the IP believe that it has been a long time in practice, but that the prior art is so well established that they can't believe that this is even on the docket.

MS. DOBREA: It is transaction costs. I mean, quite simply, if you really feel you have a slam-dunk case, that you can blow their patent out and want to at least make a run at trying to do that, then I imagine that would make sense. But it is probably more likely that the troll just wants to exact a fee that falls just shy of what it would take to litigate. "We want your litigation cost less the dollar," right? Assault their patent. But the analysis would be no different than if you are, you know, up against a nose-to-nose competitor who wants to blow you out of the marketplace. The analysis with respect to enforceability or invalidity of that patent is going to be the same. And, yeah, it is a little bit of a roll of the dice, just as much as an examination of a patent can vary based on how familiar the patent examiner is with the rules of the Patent Office and whether they really understand the technology, and that depends.

Then you get into a court, and you are going to deal with the same uncertainty. But the difference is that the party who is in the marketplace with you, who wants to blow you out, is not just going to take a little fee, whereas the patent troll, that's what they do.

MR. LONGWELL: Eventually, they are going to march down to the other fish. I don't think you march to the fish.

MR. SHANKER: Everybody up until now has spoken about how good it is to have entrepreneurs, which makes it good for our economy, et cetera. Well, if a patent holder chooses not to be an entrepreneur or chooses not to be a very aggressive entrepreneur, I have two questions. First, is there anything in our patent law that permits other entrepreneurs to force this person at least to license, to use that, and second, as a matter of policy, should there be?

MS. DOBREA: Very good questions, but the answer to the first one is no. I mean, the patent law doesn't expect the patentee to be – it is not like real property where you are making good use of the land and if you are not someone who comes along and does make good use has the potential opportunity to take over that land and have title to it.

It doesn't work that way unless the technology was funded by the federal government. Then through the Bayh-Dole Act and its implementing regulations, there is some probability to yank that out of their hands.²⁹ This is

²⁹ See generally Sandy Kleffman, *Debate Grows over Return from Stem Cell Program*, CONTRA COSTA TIMES, Nov. 1, 2005.

one reason why the clients that I counsel, who are university clients, in licensing, have to make sure that, assuming we met all the other requirements of the Bayh-Dole Act, that the licensees are not going to set the technology on the shelf just to take it out of competition where there already exists an IP position.

And that's a difficult negotiation sometimes. But that's just the way it has got to be, and for their own best interest, they have to give some meaningful thought to delivering on that promise because someone could potentially invoke marketing rights and take the technology away from them if they don't try to commercialize it.

As far as whether, you know, there should be some change by Congress to address this from a policy standpoint, I don't know.

MR. LONGWELL: Canada does have a compulsory licensing provision. So if you are not meeting demand, then there is a possibility.³⁰ You can meet all the criteria –

MR. SHANKER: Not meeting the demand of the marketplace?

MR. LONGWELL: Yes.

MS. DOBREA: So it is not just a matter of not actively commercializing it, but there is no other market alternative.

MR. LONGWELL: Yeah. There are a number of factors that are in place, that's right, but you can under certain circumstances infringe in a sense and pay a royalty.

MR. SHANKER: Of course, yes.

MR. LONGWELL: Yeah.

MS. DOBREA: No one mentioned this and we didn't really talk about it, but in the trade secret context – and it plays into what you just mentioned – just from a policy standpoint, higher using rights – there is pending legislation. Where the heck it will go, nobody knows, but there is pending legislation to create a safe harbor for prior users who are using, practicing secrets technology, whether it was a method or a composition embedded into trade secret because right now there is no right if you have a product.

I had a client recently who had this issue. The product was in the marketplace for over 30 years, and he maintained the formula as a trade secret, and a couple years ago – and just came to the kind of attention, if you don't go into the market for them, that one of their biggest competitors got a patent on that. And we analyzed it from a bunch of different fronts and concluded that it is entirely likely that the competitor derived the invention from our client, and the paper trail is that they submitted to the EPA this same information that our client submitted 30 years ago in order to put their product on this marketplace.

³⁰ Michael I. Davis, *Uniformity Flows from IP Treaties and EU Law*, 19 NAT'L L.J. 37 (1997).

That's not proof, but we have some reason to believe if they ever try to assert their patent against our client, that we could take them down on a number of fronts. But there would be a big transaction associated with just doing that, and the client was stunned. How could somebody stop us from doing what we have been doing for 30 years, and the answer is there is no clear answer. There is case law. There are a couple of lines of case law.

One case law says you will probably be okay because it is putting that thing into the marketplace, and the possibility that it could have been reverse engineered would constitute a disclosure versus the case. Well, if you have a secret method in the current text agenda, we have got an executable code in the software package that is not being sold. You are allowing access to the sort of fine line, is there a disclosure.

Can anybody possibly reverse engineer, figure out what we are doing there, and if the answer is no, then it has been effectively maintained as a secret. Therefore, there was no prior art against that latecomer patentee, and therefore, that latecomer patentee can stop you.

So while trade secret is a perfectly appropriate and viable IP to put in your basket – an IP component to put in your basket of rights, there are some risks, and if the law doesn't change on that front, then there is risk it will continue and is an indication to spend a lot of money on your lawyer some day to try to sort that out.

MR. CHERNIAK: I don't know if this is a fair question or not, but I find a whole universe of patents – that patents are becoming much more abstract, much more technically focused, much finer to distinguish from other prior art or other innovations, particularly in the software world. Are you finding that you are having to tell your clients, who are maybe software clients, regardless of the strength of their patent, they will have to expect going forward to run into other patents on technologies that will converge, even stuff that is fairly distinct today, you may patent a chunk of a process, that new technologies could end up in somebody else's back seat. Are you having to tell small entrepreneurial clients today to be prepared for that kind of thing and to have the funds to defend that kind of thing? Again, I don't know if that's a fair question.

MS. DOBREA: There are a lot of private art areas. And every once in a while there is an innovation that comes along where you look at the patent landscape, and unless there is something that hasn't been published yet, there is nothing there. Okay. That's good. That's really good from a freedom to operate and from a patentability standpoint.

Now, maybe it is because there isn't enough to waive the disclosure so nobody is going to get a patent. But that's really seldom the experience. In Europe, we are, at least, taking disclosures that are in art areas where there is again the university researcher side. There is a whole host of publications

that, at least, lead up to and are, you know, fodder for the patent examiner to try to make out a case of obviousness.

But there are plenty of disclosures where either there are a lot of different patents, lots of different ways to try to solve the problem that come off with those few that our inventors come up with, and that's where the cost really is involved because you can't tell them there is nothing there, and you can't tell them that what they have come up with isn't the solution that is wanted in the marketplace.

But we are going to have to find a way to deal with these patents that are found, and it is simple enough to say the parties – maybe there is – maybe there is one party that owns five patents all in that space, never resolved the problem, but they may have a broad dominating set of claims that on its face the patent is valid.

If that party is able to be acquired or is willing to license, there is a business solution, so you can clear it up pretty quickly. If that's a huge nose-to-nose competitor in the marketplace, you know, they might not be so nice, but maybe they want to find a solution.

So maybe they want to find your solution. So maybe that's your exit strategy, is to get it into their hands. We always tell – almost always – tell inventors what they don't like. That's the reality. And the more they strategize and think about what to do, the better chance they have got at being successful.

Does that help?

DR. KING: Ray, one more question.

PROFESSOR KU: Okay.

MR. BROWN: I don't know if you have heard of the patent auction that has been proposed, but in Japan they are talking about a university-based patent auction system.³¹ If you have heard of this, would this be a good thing for entrepreneurs or a bad thing?

MR. LONGWELL: I am trying to think. Is it a good thing or bad thing? It is not much different than homes that are real estate put up for auction. It is there. It is availability. It is an asset that should be freely traded. I can't really comment if it is a good thing or not.

Apparently, there are bargains to be had, and some people have been successful. If you read the promotions for these services, they have been successful, but I have not had experience.

MS. DOBREA: The real estate analogy is a good one. I can imagine that there are some points on which that analogy breaks down, but to the extent you have got a piece of real estate, to think of it as a real hard thing, then,

³¹ See generally Rick Merritt, *Bids Far, Few Between at First Patent Auction*, <http://www.eetimes.com/showArticle.jhtml?articleID=185301101> (last visited, Oct. 22, 2007).

however, you try to sell it, it is not going to change what you've actually got and not going to change what someone else has got.

It may alter the dynamics in the marketplace. It may make it harder or easier for someone else to be successful. It may overvalue or devalue property. It could with any other kind of property. It is not going to alter rights.

So is it good or bad? It is a shot at finding another way to meaningfully get technology transferred into the marketplace, and presumably if the buyers know what they are buying and have a plan to do something with it, then it is probably a good thing.

MR. LONGWELL: Just one last comment: The patent system is sort of like a bargain with the state. The idea is you disclose to the state which will present it and publish it as an application or as a patent, and we will teach the world how to use – to make and use – your invention with the idea that we are going to actually foster more knowledge; that we are going to create, put into some other entrepreneur's head a way to design around that patent right so that we are all smarter, so that we don't end up copying.

People say it is horrible. If there were software patents we would have no more innovation. Well, not actually, you would probably just have more copying because there wouldn't be any need to get around the patent.

So anything that brings forward the idea that there is more value to having a patent and, of course, being a patent practitioner, I think that is probably a good thing that people recognize what they are good for and how they can be used. So I don't really have a problem with auction.

PROFESSOR KU: All right. On that, I would like to thank Jim and Diane and also comment that, one, patents can be very valuable and serve these purposes, but then, Diane, your troubling comment that you often feel like you are telling inventors, no, they can't do these things or raising these problems.

MS. DOBREA: And, you know, because I try to deal with the inventors in a very business-like fashion, I try not to be the lawyer that says you can or can't do these things. The better they understand the landscape, the better they can make decisions. They are real.

Somebody has a patent that is in their space, it is real. Now, maybe you look at it and know who they are. You know you are not really directly in their competitive market space, and they will never come and do anything to you, but if you don't know they are there and they send you a cease and desist letter and you just spent millions of dollars on packaging and marketing and distribution just to pull that out and never be able to sell one product, that would be a pretty rude awakening.

So I don't tell them what they can or can't do. I tell them what the landscape is and help them to make strategic decisions.

PROFESSOR KU: Thank you both very much.